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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 111

MAX SCHAFFER and NORMAN SCHAFFER, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' PETITION FOR REHEARING

JACOB KOSSMAN,
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Philadelphia 7, Pa.
Counsel for the Petitioners.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Court has stated that none of the defendants were prejudiced by being forced to stand trial jointly. The Court has held, accordingly, that there was nothing legally wrong in a mass trial of unrelated defendants.

The basic premise of the Court, the total absence of prejudice, is completely at odds with reason and com-

mon sense. Starting with the simple fact that unrelated defendants were forced to have their guilt or innocence simultaneously weighed by a single jury, prejudice was inevitable. The common law did guarantee an accused the right to a separate trial for the very important reason that guilt was deemed personal. Of necessity there is prejudice when four people are compelled to stand trial together.

This case has particularly egregious elements. The crimes of which the defendants were charged were similar in nature. Common to all the cases was the house of Stracuzza. Stracuzza's testimony was the principal evidence against them. The seeds of prejudice were clearly sown in this situation.

Added to this, the damaging evidence was presented to the jury as applying indiscriminately to all of the defendants. When the prosecution case was introduced, the baseless conspiracy charge still stood. Here is the greatest vice of this case. The first and most important impression upon the jury was that all the evidence condemned all the defendants. Under the conspiracy charge, it was common evidence "subject to connection." The crucial first impression in the jurors' minds lumped all the evidence and all the defendants.

It is an unmitigated fiction to suppose that the judge's charge at the end of the trial could undo the harm. On page 1436 of the transcript, the trial judge finally told the jurors that "the various exhibits and testimony that I admitted against one defendant subject to connection against the others is now admitted only against that particular defendant that the exhibit referred to, or the testimony referred to." Thus, in

one stroke, after weeks of trial, the jury was expected to retrace all the convoluted processes of the human mind and erase the "inadmissible" subtle conclusions that had been fixed there by the evidence as received. By that stage the image of the defendants had been fixed for better or worse. This image is a composite of an infinite number of sources. It is a manifest impossibility to eradicate the effects of that evidence which, as it turns out, should not have been part of the jury's image of a defendant.

In short, the Court simply cannot have meant to say that there was *no prejudice* to the defendants in this case. Prejudice is inherent in any joint trial. It is magnified and enlarged when the charges against the accused are similar and there is a common witness so important as Anthony Stracuzza. This complex is grossly aggravated when the evidence is initially presented to the jury on the premise that it all applies to each defendant. Substantial prejudice in this circumstance is inevitable.

II.

Petitioners continue to be confounded by the completely erroneous proposition that they raised the question of improper joinder of parties, after the conspiracy counts had been dismissed, solely in terms of a motion for judgment of acquittal. The Solicitor General made this assertion in his brief, to which petitioners filed an unequivocal denial. At the oral argument, Mr. John Davis mentioned this matter but did not pursue it beyond citation to the pages of the record on which the Government relied for its statement.

Despite this history, the Court has declared in its opinion that the petitioners "*relied entirely on their*

motions for acquittal" in challenging the prejudicial effect of their joinder. Adv. Op. p. 5. This is, we repeat, an utterly erroneous reading of the record in this case and has done petitioners incalculable harm.

The record of the proceedings which transpired in the trial court can be divided into several very distinct phases, only one of which is relevant to the issue now before this Court. First, the District Court essentially on his own motion, dismissed the two conspiracy charges. R. 11a-12a (Tr. 1414-1416). Next, the judge and the prosecutor had a brief exchange on the problem of aggregation of values for the substantive offense. R. 12a-13a (Tr. 1417-1418).

At that point, Mr. Steinberg, for the defendants, argued to the Court that there had been a huge mass of evidence which had been admitted subject to connection on the conspiracies, that the evidence now admissible against each defendant alone would be very hurtful to the other defendants, and that the defendants would all be deprived of a fair trial. Mr. Steinberg said that the prosecutor, in choosing to join the defendants under a flimsy conspiracy charge, took a calculated risk that a great deal of evidence would be admitted which might be prejudicial as to some of the defendants. Mr. Steinberg expressed grave doubt that this prejudice could be erased by instructions. R. 13a-14a (Tr. 1418-1421).

The whole gist of this argument to the District Court focused on the necessity for separate trials of the defendants. Before any motion was made, however, the trial judge indicated that, in his view, the prejudice could be cured by instructions. R. 14a (Tr. 1421). For all practical purposes, this closed the matter. Once the

Court had *ruled* that the situation can adequately be handled by cautionary instructions to the jury, to have made thereafter a formal motion for severance would obviously have been futile. Furthermore, objection to continuance of the trial having plainly been made, cf. Rule 51, F.R. Crim. P., counsel were not required to reargue the same point.

None of this discussion on joinder had the slightest connection with the motions for judgments of acquittal. The argument turned back again to the matter of aggregation of values of separate shipments. R. 15a-19a (Tr. 1424-1430). The trial court indicated that he was going to send the case to the jury with binding instructions on the issue of jurisdictional value of the goods involved. At the conclusion of this discussion, the Court stated that he assumed a motion to dismiss was filed as to the respective counts and that he would reserve decision. R. 19a (Tr. 1430). On the following day, Mr. Coleman formally moved for judgment of acquittal "upon the basis that the Government has failed to establish that merchandise was transported in interstate commerce, in a value equal to or in excess of the jurisdictional amount . . ., and that with knowledge that the same was stolen." R. 21a (Tr. 1446). Again the Court reserved decision.

It is impossible in this record to find that the issue of prejudicial joinder was raised to support the motions for judgment of acquittal. The misjoinder issue arose only once. Counsel urged the harm which befell each of the defendants and the trial judge indicated that he thought the prejudice could be erased by cautionary instructions. There the matter ended. Misjoinder was never presented as grounds for acquittal.

We submit, it is grossly unfair to the petitioners in these cases to penalize them for failure of trial counsel to make what would clearly have been a futile motion and one not even required by the Federal Rules of Criminal Procedure. This is precisely the effect, however, of this Court's statement that petitioners "relied entirely on their motions for acquittal." The statement in the opinion at Adv. Op. p. 5 that they "even failed to request a new trial"—a motion that has always been regarded as one made *after* the verdict—not one made during trial was not even the basis for an argument by the Government in the Court below or even considered by the Court below in its opinion.

There is a collateral consequence which will necessarily follow from this Court's use of the procedural issue to justify withholding of relief to these petitioners. It will become incumbent upon defense counsel in all future cases to challenge the propriety of joinder of defendants at the outset of any joint trial to insure protection of their clients. This virtually automatic procedure will entail a considerable added burden to the administration of the criminal law, not only in the District Courts but in the Courts of Appeals and this Court as well. Such a ramification ought to be thoroughly weighed before this decision is allowed to become settled.

III.

This Court has many times and emphatically voiced concern over the vagrant and volatile distension of the conspiracy concept. In *Grunewald* v. *United States*, 353 U.S. 391, 404, Mr. Justice Harlan said for the Court: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to

broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not again be detailed."

Notwithstanding this Court's decision in this case opens up a new avenue of abuse, a further step in what Mr. Justice Jackson described as "the long evolution of that elastic, sprawling and pervasive offense" of conspiracy. This case, being one of first impression in this Court, now permits prosecutors to violate at will the safeguards which heretofore have been thought to protect persons accused of crime from being tried en masse. There are now no enforceable limitations whatsoever upon the unbridled discretion of prosecuting officers who can achieve an illegal joint trial by the simple device of a conspiracy charge, whether or not there is any basis for such a charge. Given the normal human desire to succeed, undoubtedly there will soon be a proliferation of cases in which the prosecution seeks to obtain the windfall of mass trials, where guilt can no longer be personal.

The only limitation which the Court has attached to this dangerous precedent is an admonition to trial judges in future similar cases. They are instructed to be "particularly sensitive" to the prejudice suffered by unrelated defendants forced to stand trial as a group. Since it is inescapable that there is very great prejudice deriving from the simple fact of the illegal joint trial, the Court's meaning of "particular sensitivity" obviously tolerates some degree of prejudice. Nothing really illuminates the standard by which the intolerable harm is to be measured. At best, the court's opinion in this regard expresses a mood.

The worst of the matter is that it is addressed to trial judges, who are not the source of the evil, rather than to prosecutors, who are. No amount of verbiage can disguise the plain fact that the problem must be met *at the time the indictment is drawn* if it is to be truly met at all. Petitioners urged the Court to accept a standard which would have compelled prosecutors, in deciding whether to include a conspiracy charge, to face the risk of having to retry the case in entirety if the conspiracy charge were a fiction. That seemed a small cost to pay for preservation of so basic a right as is at stake for the defendants. Instead the Court has chosen to rely on the trial judge's discretion, which must be exercised after the trial is over.

Even this slight limitation, however, is undermined by the actual decision of the Court. The lower courts reached their decisions in this case unaware, of course, that the Supreme Court would admonish them to be particularly sensitive to the possibilities of prejudice in this kind of case. This Court nonetheless relied upon the judgment of the lower courts on the matter of prejudicial joinder. The reliance, at one point, went to the unprecedent extent of the "clearly erroneous" standard familiar in appellate review of issues of fact. Adv. Op. p. 2. To hold, as the Court does, that the judgments are affirmed deprives the Court's admonition of any real meaning.

Even if this Court remains fixed on allowing joinder by the stratagem used in this case, subject to trial courts' discretionary severance, petitioners ought to be given a chance to have the lower courts pass upon their case in the light of the special instructions put forward by the Court in this case. This would be accomplished by remanding the case for further consideration of

whether a "particularly sensitive" reading would still warrant the same result.

For the foregoing reasons, it is respectfully submitted that the Court should grant a rehearing.

Respectfully submitted,

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CERTIFICATION

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

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June 1960

SUPREME COURT OF THE UNITED STATES

Nos. 111 AND 122.—OCTOBER TERM, 1959.

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[May 16, 1960.]

MR. JUSTICE CLARK delivered the opinion of the Court.

Involved here are questions concerning joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure,[1] and whether shipments of stolen goods in interstate commerce may be aggregated as to value in order to meet the statutory minimum of $5,000, under 18 U. S. C. § 2314.[2] The indictment charged trans-

[1] Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

[2] 18 U. S. C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U. S. C. § 2311 provides so far as material here:

"'Value' means the face, par, or market value, whichever is the

portation in interstate commerce of goods known to have been stolen and having a value in excess of $5,000. It contained three substantive counts. Count 1 charged the two petitioners Schaffers and the three Stracuzzas (defendants below, who either pled guilty or were *nolle prossed* at trial) with transporting stolen ladies' and children's wearing apparel from New York to Pennsylvania. Count 2 charged petitioner Marco and the Stracuzzas with a similar movement of stolen goods from New York to West Virginia. Count 3 charged petitioner Karp and the Stracuzzas with like shipments from New York to Massachusetts. The fourth and final count of the indictment charged all of these parties with a conspiracy to commit the substantive offenses charged in the first three counts. The petitioners here were tried on the indictment simultaneously in a single trial. On motion of petitioners for acquittal at the close of the Government's case, the court dismissed the conspiracy count for failure of proof. This motion was denied, however, as to the substantive counts, the court finding that no prejudice would result from the joint trial. Upon submission of the substantive counts to the jury on a detailed charge each petitioner was found guilty and thereafter fined and sentenced to prison. The Court of Appeals affirmed the convictions, likewise finding that no prejudice existed by reason of the joint trial. 266 F. 2d 435. We granted certiorari. 361 U. S. 809. The allegations of the indictment having met the explicit provisions of Rule 8 (b) as to joinder of defendants, we cannot find clearly erroneous the findings of the trial court and the Court of Appeals that no prejudice resulted from the joint trial. As to the requirements of value, we hold that the shipment to a

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greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

single defendant may be aggregated. The judgments are therefore affirmed.

We first consider the question of joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure. It is clear that the initial joinder of the petitioners was permissible under that Rule, which allows the joinder of defendants "in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It cannot be denied that the petitioners were so charged in the indictment. The problem remaining is whether, after dismissal of the conspiracy count before submission of the cases to the jury, a severance should have been ordered under Rule 14 [3] of the Federal Rules of Criminal Procedure. This Rule requires a separate trial if "it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together . . . ." Under the circumstances here, we think there was no such prejudice.

It is admitted that the three Stracuzzas were the common center of the scheme to transport the stolen goods. The four petitioners here participated in some steps of the transactions in the stolen goods, although each was involved with separate interstate shipments. The separate substantive charges of the indictment employed almost identical language and alleged violations of the same criminal statute during the same period and in the same manner. This made proof of the over-all opera-

[3] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

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[3] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

tion of the scheme competent as to all counts. The variations in the proof related to the specific shipments proven against each petitioner. This proof was related to each petitioner separately and proven as to each by different witnesses. It included entirely separate invoices and other exhibits, all of which were first clearly identified as applying only to a specific petitioner and were so received and shown to the jury under painstaking instructions to that effect. In short, the proof was carefully compartmentalized as to each petitioner. The propriety of the joinder prior to the failure of proof of conspiracy was not assailed.[4] When the Government rested, however, the petitioners filed their motion for dismissal and it was sustained as to the conspiracy count. The petitioners then pressed for acquittal on the remaining counts, and the court decided that the evidence was sufficient on the substantive counts. The case was submitted to the jury on each of these counts, and under a charge which was characterized by petitioners' counsel as being "extremely fair." This charge meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were "not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant."

Petitioners contend that prejudice would nevertheless be implicit in a continuation of the joint trial after dismissal of the conspiracy count. They say that the resulting prejudice could not be cured by any cautionary instructions, and that therefore the trial judge was left with no discretion. Petitioners overlook, however, that the joinder was authorized under Rule 8 (b) and that subsequent severance was controlled by Rule 14, which provides for separate trials where "it appears that a

[4] A motion of petitioner Karp for a severance on grounds other than those tendered here was denied. 158 F. Supp. 522.

defendant . . . is prejudiced . . . by such joinder for trial . . . ." It appears that not only was no prejudice shown, but both the trial court and the Court of Appeals affirmatively found that none was present. We cannot say to the contrary on this record. Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice. However, the petitioners here not only failed to show any prejudice that would call Rule 14 into operation but even failed to request a new trial. Instead they relied entirely on their motions for acquittal. Moreover, the judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each petitioner separately under the respective substantive counts. The terms of Rule 8 (b) having been met and no prejudice under Rule 14 having been shown, there was no misjoinder.

This case is not like *United States* v. *Dietrich*,[5] where a single-count indictment against two defendants charged only a single conspiracy offense, or *McElroy* v. *United States*,[6] where no count linked all the defendants and all the offenses. Neither is *Kotteakos* v. *United States*,[7] on which the petitioners place their chief reliance, apposite. That case turned on the harmless-error rule, and its appli-

[5] 126 F. 664.
[6] 164 U. S. 76 (1896).
[7] 328 U. S. 750 (1946).

cation to a serious variance between the indictment and the proof. There the Court found "it highly probable that the error had substantial or injurious effect." 328 U. S., at 776. The dissent agreed that the test of injury resulting from joinder "depends on the special circumstances of each case," *id.*, at 777; but it reasoned that the possibility was "non-existent" that evidence relating to one defendant would be used to convict another, and declared that the "dangers which petitioners conjure up are abstract ones." *Id.*, at 778. The harmless-error rule which was the central issue in *Kotteakos*, is not even reached in the instant case, since here the joinder was proper under Rule 8 (b) and no error was shown.

Petitioners also contend that, since the individual shipments with which they were connected amounted to less than $5,000 each, the requirements of the statute as to value were not present. However, it appeared at the trial that the total merchandise shipped to each petitioner during the period charged in the several counts was over $5,000, even though each individual shipment was less. The trial court permitted the aggregation of the value of these shipments to meet the statutory limit,[9] and it is this that is claimed to be error. A sensible reading of the statute properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated. The Act defines "value" in terms of that aggregate.[9] The legislative history makes clear that the value may be computed on a "series of transactions."[10] It seems plain that the Stracuzzas and each of the petitioners were engaged in a series of trans-

[9] See note 2, *supra*.

[9] See note 2, *supra*.

[10] H. R. Rep. No. 1462, 73d Cong., 2d Sess., p. 2; H. R. Conf. Rep. No. 1559, 73d Cong., 2d Sess., p. 3.

actions, and therefore there is no error on that phase of the case.[11]

Petitioners in No. 122 further contend that certain of the prosecutor's remarks in his summation to the jury were improper and prejudicial. We agree with the treatment of this issue by the Court of Appeals, and see no need for further elaboration.

The judgments are therefore

Affirmed.

[11] This is not a case like *Andrews* v. *United States*, 108 F. 2d 511, where aggregation of shipments to a number of individuals was justified on the theory of a common design among the recipients. The instant case, unlike *Andrews*, involves aggregation of a number of shipments to a single defendant, and therefore it was quite unnecessary to justify aggregation on the theory of common design.

SUPREME COURT OF THE UNITED STATES

Nos. 111 AND 122.—OCTOBER TERM, 1959.

Max Schaffer and Norman Schaffer, Petitioners, 111 v. United States of America.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
Hyman Karp and Benjamin T. Marco, Petitioners, 122 v. United States of America.	

[May 16, 1960.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BRENNAN concur, dissenting.

The indictment in these cases charged violations of 18 U. S. C. § 2314 for transporting in interstate commerce goods known to have been stolen [1] and having a value in excess of $5,000.[2]

Counts 1, 2, and 3 were substantive counts. Count 1 charged the two Schaffers, petitioners in No. 111, together with three Stracuzzas, of transporting stolen ladies' and

[1] 18 U. S. C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[2] 18 U. S. C. § 2311 provides so far as material here:

"'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

children's wearing apparel from New York to Pennsylvania between May 15, 1953, and July 27, 1953.

Count 2 charged Marco, one of the petitioners in No. 122, and the Stracuzzas with a similar movement from New York to West Virginia from June 11, 1953, to July 27, 1953.

Count 3 charged Karp, the other petitioner in No. 122, with a like shipment from New York to Massachusetts from May 21, 1953, to July 27, 1953.

Count 4 charged all the parties with a conspiracy to commit the substantive offenses.

Two of the Stracuzzas (who seemed to be the brains behind the various illegal transactions) pleaded guilty and received suspended sentences. The indictment against the third Stracuzza was disposed of *nol. pros.* The four present petitioners pleaded not guilty and were tried simultaneously in a single trial,[3] one of the Stracuzzas being the principal witness for the Government.

At the close of the Government's case the court dismissed the conspiracy count [4] for failure of proof. Indeed it does not appear even arguable that there was evidence linking all petitioners with each other in one conspiracy. Over objection the court continued the joint trial on the remaining substantive counts, instructing the jury that the evidence against each defendant was to be considered separately, the proof against one not to be used against another.

It is clear that but for the conspiracy count the joinder of these petitioners for similar but unrelated crimes would have been in error. Rule 8 (b) of the Federal Rules of Criminal Procedure allows joinder of defendants in the

[3] A motion of petitioner Karp for a severance was denied. 158 F. Supp. 522.

[4] A separate indictment charging a conspiracy between petitioner and others to violate 18 U. S. C. § 659 by receiving and concealing goods stolen in interstate commerce was also dismissed.

same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[3]

The Court of Appeals, while conceding that it would have been clearly erroneous to try petitioners together were it not for the conspiracy count, concluded that no showing of prejudice had been established and that the District Court did not abuse its discretion in denying separate trials.

I take a different view. I believe that once the conspiracy count was dismissed, the court had before it the same problem as would be presented if the prosecution had sought to try before a single jury separate indictments against defendants who had been charged with like crimes but which were wholly unrelated to each other.

Rule 8 (b)[4] contemplates joinder of defendants in two types of situations—first, where they participate jointly in one "act or transaction"; or second, where they participate "in the same series of acts or transactions constituting an offense or offenses." These four petitioners did not participate in one act or transaction as evidenced by the fact that the proof of conspiracy utterly failed. The other acts or transactions charged were not in the same "series," within the meaning of Rule 8 (b).

Mr. Justice Van Devanter, when circuit judge, in *United States* v. *Dietrich*, 126 F. 664, 670, said:

"Much can be said in support of a practice which, subject to a discretion invested in the court to enable

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[3] Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

[4] See note, 5, *supra*.

> it to do justice between the government and the accused, permits two or more defendants to be in separate counts of the same indictment severally charged with distinct and several offenses of the same class and grade, and subject to the same punishment, where the offenses appear to have been committed at the same time and place and to form parts of the same transaction. Under such circumstances the proof in respect to one offense would almost necessarily throw light upon the other or others, and the connection between them would frequently be so close that it would be difficult or impossible to separate the proof of one from the proof of the other or others."

McElroy v. *United States*, 164 U. S. 76, decided long before the present Rules, held it error to consolidate four indictments charging unrelated offenses (arson and assault with intent to kill) where six people were named in three of the indictments and only three of the six in the remaining one. The Court said the question of joinder or severance did not rest "in mere discretion"; that under those circumstances joinder was error as a matter of law:

> "[S]uch joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." *Id.*, at 81.

I think this is the sound rule and consistent with what Mr. Justice Van Devanter said in the *Dietrich* case. There must somehow be a nexus between the several

transactions charged against the several defendants, lest proof of distinct transactions blend to the prejudice of some defendants. The evidence concerning these petitioners was not in any proper sense of the words evidence concerning "the same series of acts or transactions" constituting an offense. The Schaffers had nothing to do with Karp's shipments to Massachusetts nor Marco's shipments to West Virginia; nor did the latter two have anything to do with Schaffer's shipments to Pennsylvania. The only possible connection between these disparate transactions was the fact that each petitioner dealt with the Stracuzzas who were the brains of these deals. But that was a happenstance which did not make petitioners any the less strangers to each other. The Pennsylvania, Massachusetts, and West Virginia shipments had nothing in common except they were all from the house of Stracuzza. Yet customers of one shop, engaged in an illegal enterprise, do not become participants "in the same series of acts or transactions," unless somehow or other what each does is connected up with the others or has some relation to them.

It is said that the joinder was proper if participation "in the same series" of transactions was "alleged" in the indictment. Such an allegation, to be sure, saves the indictment from attack at the preliminary stages. Yet once it becomes apparent during the trial that the defendants have not participated "in the same series" of transactions, it would make a mockery of Rule 8 (b) to hold that the allegation alone, now known to be false, is enough to continue the joint trial.

The Court in *Kotteakos* v. *United States*, 328 U. S. 750, 773, disapproved the bunching for trial of eight or more conspiracies related in kind "when the only nexus among them lies in the fact that one man participated in them all." Guilt with us remains personal. The "dangers of transference of guilt from one to another across the line

separating conspiracies, subconsciously or otherwise, are so great," said the Court in the *Kotteakos* case, "that no one really can say prejudice to substantial right has not taken place." *Id.*, at 774. A like danger of such transference existed in the present case. It is not enough to say that evidence of the guilt of each of the present petitioners may have been clear. Reasons for severance are founded on the principle that evidence against one person may not be used against a codefendant whose crime is unrelated to the others. Instructions can be given the jury and admonitions can be made explicit that the line between the various defendants must be kept separate. The district judge conscientiously made that effort here. But where, as here, there is no nexus between the several crimes, the mounting proof of the guilt of one is likely to affect another. There is no sure way to protect against it except by separate trials, especially where, as here, the several defendants, though unconnected, commit the crimes charged by dealing with one person, one house, one establishment. By a joint trial of such separate offenses, a subtle bond is likely to be created between the several defendants though they have never met nor acted in unison; prejudice within the meaning of Rule 14[1] is implicit.

This is unlike the case where the conspiracy count and the substantive counts are submitted to the jury, the verdict being not guilty of conspiracy but guilty on the other count. There is then no escape from the quandary in which defendants find themselves. Once the conspiracy is supported by evidence, it presents issues for the jury to

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[1] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

decide. What may motivate a particular jury in returning a verdict of not guilty on the conspiracy count may never be known.

Conspiracy presents perplexing problems that have long concerned courts. See *Krulewitch* v. *United States*, 336 U. S. 440; *Delli Paoli* v. *United States*, 352 U. S. 232. While it is proper at times to join a conspiracy count with substantive counts even where the latter are the same as the overt acts charged in the conspiracy count, *Pinkerton* v. *United States*, 328 U. S. 640, there is danger in any multiplication. The loose practice of trying to bring together into one conspiracy those whose ties are at best extremely tenuous has often been criticized.[1] We allow conspiracy to be put to new dangerous uses when we sanction the practice approved here.

I would reverse these judgments and remand the causes for new trials.

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[1] See Annual Report of the Attorney General for 1925, pp. 5–6; O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Brooklyn L. Rev. 263; Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 980–983; Note, Guilt by Association: Three Words in Search of a Meaning, 17 U. of Chi. L. Rev. 148; Note, The Conspiracy Dilemna: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276; *United States* v. *Falcone*, 109 F. 2d 579, 581 (C. A. 2d Cir.); *United States* v. *Liss*, 137 F. 2d 995, 1003 (C. A. 2d Cir.) (dissenting opinion).